

SAN JUAN COUNTY

IBLA 88-246, 88-247

Decided April 29, 1988

Appeals from decisions of the New Mexico State Office, Bureau of Land Management, suspending Recreation and Public Purposes Act leases NM 28553 and NM 088452.

Referred for hearing.

1. Administrative Procedure: Hearings--Federal Land Policy and Management Act of 1976: Hearings--Federal Land Policy and Management Act of 1976: Leases--Recreation and Public Purposes Act--Rules of Practice: Hearings

In accordance with 43 U.S.C. | 1732(c) (1982), BLM may suspend or revoke any instrument providing for the use, occupancy, or development of the public lands, including a lease issued pursuant to the Recreation and Public Purposes Act, 43 U.S.C. | 869 (1982), for the violation of any term or condition of the instrument only after notice and an opportunity for a hearing, provided, however, that BLM may order an immediate temporary suspension prior to a hearing where it determines it is necessary to protect health or safety or the environment, unless other applicable law contains specific provisions for the suspension, revocation, or cancellation of a particular land-use authorization.

APPEARANCES: B. J. Baggett, Esq., County Attorney, Aztec, New Mexico, for appellant; Gayle

E. Manges, Esq., Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

By separate decisions dated January 15, 1988, the New Mexico State Office, Bureau of Land Management (BLM), suspended leases NM 28553 and NM 088452 issued to San Juan County, New Mexico, for landfills pursuant to the Recreation and Public Purposes (R&PP) Act, 43 U.S.C. || 869 - 869-4 (1982). 1/ The decisions stated that preliminary results of contractor site investigations showed that "contamination has migrated downward" and that samples taken along the perimeters of the landfills "indicate that contamination * * * has migrated beyond" the edges of the landfills. The decisions stated that allowing disposal of hazardous wastes at unauthorized sites is a violation of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. || 9601-9657 (1982), and 43 CFR 2741.5(j) 2/ and that releases of hazardous wastes into the environment was also a violation of CERCLA. "Therefore, the site is in violation of CERCLA and the lease terms and stipulations accepted by the lessee," the decisions concluded, citing sections 4(a), 4(c), and 4(g) of both leases, 3/ and

1/ Lease NM 28553 was issued to the San Juan County Road Department on July 26, 1978, for a 20-acre site for the Flora Vista Sanitary Landfill for a period of 20 years for a rental of \$100 for the term of the lease. Lease NM 088452 was issued to the Board of County Commissioners of San Juan County on May 21, 1962, for a 90.24-acre site for a period of 20 years for a rental of \$39.75 per year. It was renewed for 5 years as to 50.24 acres on Jan. 10, 1983; extended until Dec. 1, 1987, on May 14, 1987, as to 40.24-acres; and extended again until June 30, 1988, on December 22, 1987. The 40.24-acre site is known as the Kirtland landfill.

2/ This regulation states: "The Act shall not be used to provide sites for the disposal of permanent or long-term hazardous wastes."

3/ These lease provisions read:

"Sec. 4. In consideration of the foregoing, the lessee hereby agrees:

"(a) To improve and manage the leased area in accordance with the plan [of development and management designated as] Blanco and Kirtland Sanitary landfills [and approved by an authorized officer on] * * * or any

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section II(e) of the plan of operations for lease NM 28553. 4/ San Juan County filed timely notices of appeal and a statement of reasons; BLM has filed an answer. We have given the matters expedited consideration.

[1] Our disposition of these appeals is governed by section 302(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. | 1732(c) (1982), which provides:

fn. 3 (continued)

modification thereof hereinafter approved by an authorized officer, and to maintain all improvements, during the term of this lease, in a reasonably good state of repair.

* * * * *

"(c) Not to allow the use of the lands for unlawful purposes or for any purpose not specified in this lease unless consented to under its terms; not to prohibit or restrict, directly or indirectly, or permit its agents, employees, contractors (including, without limitation, lessees, sublessees, and permittees), to prohibit or restrict the use of any part of the leased premises or any of the facilities thereon by any person because of such person's race, creed, color, sex, or national origin.

* * * * *

"(g) To take such reasonable steps as may be needed to protect the surface of the leased area and the natural resources and improvements thereon."

(The quoted language is from renewed lease NM 088452. In NM 28553 the bracketed language is replaced with "attached hereto and made a part of this lease.")

4/ This section of the plan for the Flora Vista landfill provides:

"e. Types and Quantities of Solid Waste Disposal

"There will be RESTRICTIONS as to the type of solid waste accepted at the site. Hazardous waste items will not be accepted at the site. There will be a sign approximately 4'x8' in size which will be placed at the entrance to the site. The sign will read "WARNING, HAZARDOUS WASTE WILL NOT BE ACCEPTED AT THIS SITE. IF YOU WISH TO DISPOSE OF ANY OF THE ITEMS LISTED IN THE GLASS COVERED CASE ON THE RIGHT, PLEASE CONTACT THE LOCAL EIA OFFICE AT 724 West Animas, Farmington, N.M. #327-9851, FOR INSTRUCTIONS." (see attachment I for list of common names that will be posted in a glass covered case attached to the sign). There will be no other restrictions, other than the list posted at the site. The dead animal and sludge pit will be covered immediately whenever possible, otherwise it will be covered before 5 p.m. daily."

The Secretary shall insert in any instrument providing for the use, occupancy, or development of the public lands a provision authorizing revocation or suspension, after notice and hearing, of such instrument upon a final administrative finding of a violation of any term or condition of the instrument, including, but not limited to, terms and conditions requiring compliance with regulations under Acts applicable to the public lands and compliance with applicable State or Federal air or water quality standard [sic] or implementation plan [sic]: Provided, That such violation occurred on public lands covered by such instrument and occurred in connection with the exercise of rights and privileges granted by it: Provided further, That the Secretary shall terminate any such suspension no later than the date upon which he determines the cause of said violation has been rectified: Provided further, That the Secretary may order an immediate temporary suspension prior to a hearing or final administrative finding if he determines that such a suspension is necessary to protect health or safety or the environment: Provided further, That, where other applicable law contains specific provisions for suspension, revocation, or cancellation of a permit, license, or other authorization to use, occupy, or develop the public lands, the specific provisions of such law shall prevail. [Emphasis added.]

Although these leases do not include the provision required by this statute, this omission does not excuse BLM from adhering to the section 302(c) procedural requirements, if applicable. James C. Mackey, 96 IBLA 356, 364, 94 I.D. 132, 137 (1987). In that case we held that the requirements of this section are not restricted to instruments issued by BLM under section 302(b) of FLPMA, 43 U.S.C. | 1732(b) (1982), and that "Congress intended this requirement to extend to all land use authorizations issued by the Department under any law for lands managed by BLM." 96 IBLA at 365, 94 I.D. at 137. In Mackey we held that this section governed the suspension of permits issued pursuant to the Archaeological Resources Protection Act, 16 U.S.C. | 470aa (1982), because that statute did not contain specific provisions for the suspension or revocation of a permit under the circumstances cited by BLM. Id. Similarly, in this case, the final sentence of

43 U.S.C. | 869-1 (1982) 5/ does not contain specific provisions for the suspension or revocation of an R&PP Act lease under the circumstances cited in the BLM decisions under appeal here, so the procedural requirements of 43 U.S.C. | 1732(c) apply. 6/ Thus, BLM may suspend or revoke an R&PP Act lease for violation of one or more of its terms or conditions only after notice and an opportunity for a hearing.

In its statement of reasons, San Juan County disputes the facts cited in BLM's decisions as the basis for suspending the leases, namely, that hazardous substances are migrating off the lease premises or that they threaten groundwater. 7/ In its answer BLM cites the findings of vertical

5/ "Each lease shall contain a provision for its termination upon a finding by the Secretary that the land has not been used by the lessee for the purpose specified in the lease for such period, not over five years, as may be specified in the lease, or that such land or any part thereof is being devoted to another use."

6/ In this case the concern is that the landfills have become contaminated with hazardous wastes. We do not consider that would constitute devoting part of the lands under the R&PP Act leases to "another use" within the meaning of 43 U.S.C. 869-1 (1982).

7/ San Juan County's statement of reasons reads in part, at 1:

"To support the closure order, the Bureau of Land Management claims that 'Analyses of samples taken along perimeter of the landfills indicate that contamination has migrated beyond the boundary.' This statement is totally unsupported by any data. We challenge the record submitted to support this statement even as an inference.

"Secondly, there is no groundwater present beneath these landfills down to 250 feet and probably deeper. The report indicates that water was encountered approximately one mile northwest of the Flora Vista Landfill at a depth of 72 feet. At the Kirtland site, the County hired Western Technologies, Inc. to conduct boring tests on the site. The results are enclosed. You can see that no groundwater was found to a depth of 36 feet in the various holes bored.

"There have been over 20,000 wells drilled in the San Juan Basin, and the Petroleum Geologists who have participated in the drilling and have studied logs of wells drilled in the Kirtland shale indicate that water is rarely encountered, and if so, it is contained in limited lenticular deposits and is non-migratory (see report of Mark E. Weidler [attached to the statement of reasons]).

and horizontal migration of chemical compounds in the contractor's reports of the site investigations of the two landfills that were the basis for the decisions under appeal. The answer acknowledges that extensive sampling was not done on and off site due to budgetary restrictions, and concludes: "our decision to suspend the R&PP leases to prevent further addition of waste into the landfills, compounding our existing problems, was based on a violation of CERCLA." 8/

The disputed facts as well as the requirements of section 1732(c) make it appropriate to order a hearing in this case. James C. Mackey, supra; 43 CFR 4.415.

fn. 7 (continued)

"There are no water wells near these sites, and the nearest homes are on domestic water supplies from Lower Valley Water Users Association in the Kirtland area and Flora Vista Water Users in the Flora Vista area.

"The County stopped accepting any liquids at the Kirtland site over two years ago, and stopped taking septage at the Flora Vista site more than one year ago. The lagoons were pumped out and back-filled with the dirt which was stockpiled when the lagoons were dug. Whatever residue from oil tank bottoms or engine oil that had been soaked up in the bottom of the pits is still detectable by boring directly into the lagoons. It has migrated nowhere, and is highly unlikely to do so (see Weidler report). It has not even migrated 75 feet laterally to the other solid waste trenches on the site."

8/ Memorandum dated Apr. 8, 1988, from State Director, BLM, to Field Solicitor, entitled "Response to Statement of Reasons for Appeal-Closure of San Juan County Landfills," at 3. This memorandum elaborated on the problems as follows:

"Although protection of the public is of utmost concern to the Bureau, our decision to close the landfills was not based solely on protection of the public health and safety. As trustee of the natural resources on public lands, it is our duty to protect resources, including groundwater. Allowing the addition of waste to the landfills where releases of contaminants have already occurred, as shown in the [contractor] reports, increases the chances of damage to resources. Also, when any nonhazardous wastes are added to hazardous wastes, the entire volume must be considered hazardous. Because these landfills have been shown to contain hazardous materials, we feel that any addition of even nonhazardous wastes will very likely increase our future liability and cleanup costs." Id.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we refer these cases to the Hearings Division for a hearing in accordance with 5 U.S.C. | 554 (1982) to determine whether San Juan County has violated the terms of the leases, CERCLA, or other applicable law. ^{9/} BLM shall have the burden of going forward to establish a prima facie case of such violations, and San Juan County shall have the ultimate burden of persuasion that there is no violation. If the Administrative Law Judge determines that such violations exist, he shall order the lease involved suspended. The decision of the Administrative Law Judge shall constitute final action for the Department, absent the timely filing of an appeal with this Board pursuant to 43 CFR 4.410.

Will A. Irwin
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

^{9/} If the Administrative Law Judge prefers to conduct a separate hearing for each lease, he may of course do so.